



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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Memorandum

Date: January 20, 2023

To: Richard Conescu, Chair, & Members, Zoning Board of Adjustment

From: Timothy J. Thompson, AICP, Community Development Director

Subject: **Governor's Hill Corp (petitioner/owner)** - Equitable Waiver of Dimensional Requirements under Section 3.02.4 of the Zoning Ordinance to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-05.

The following information is provided to aid in your consideration of the above referenced case. Additional background and application materials are included in your packet.

Background & Project Description

If the Board has already granted the variance in Case 2023-02, then this petition is unnecessary and should be either withdrawn by the petitioner or deemed moot by the Board.

Map 6D, Lot 104 is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. The lot is approximately 0.637 acres and is serviced by municipal water (MVD) and a private septic system. The lot is surrounded by residential uses and also abuts Reeds Ferry Elementary School.

The petitioner seeks an Equitable Waiver of Dimensional Requirements to allow an existing retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required. Staff notes that the 2021 Zoning Ordinance defines the term **Structure** as follows:

57. Structure: Anything constructed or erected, the use of which demands its permanent location on the land, or anything attached to something permanently located on the land.

In the Town of Merrimack, anything meeting the definition of a structure is subject to building permit requirements. Staff also notes that the 2018 International Building Code exempts retaining walls that are less than 4 feet in height from needing a building permit.

In this particular case, the subject retaining wall is, at its tallest point shown on the certified plot plan, 18.3 feet in height. This particular section of the wall happens to also be located within the building setback. Since the wall exceeds 4 feet in height within the setback area, it is considered a structure

not only by the Town's Zoning Ordinance, but also by the 2018 International Building Code and is both subject to a building permit and building setbacks, necessitating the variance.

Standard of Review

It is the burden of the Petitioner to demonstrate that the requirements for the granting of an Equitable Waiver of Dimensional Requirements under RSA 674:33-a have been met to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required, are met.

In order for an Equitable Waiver to be legally granted the Board would need to make each of the following findings stated in RSA 674:33-a in order to grant the Equitable Waiver:

- That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;
- That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;
- That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and
- That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

Staff Guidance on Potential Motions

Staff cannot make specific recommendations for action to the Zoning Board of Adjustment due to the Board's status as a quasi-judicial body. However, staff suggests the Board use one of the following templates for a motion to grant or deny the variance, depending whichever course of action the Board deems appropriate:

Potential Motion to DENY the Equitable Waiver:

"I make a motion to deny the Equitable Waiver to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required, for the following reasons:

- ***List the specific findings that the petitioner failed to meet from RSA 674:33-a (outlined above)***

Potential Motion to GRANT the Equitable Waiver:

"I make a motion that the Board finds the petitioner's has met requirement of RSA 674:33-a, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant

the Equitable Waiver to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required.”

Ec: Governor's Hill Corp., petitioner
Eli Leino, Bernstein Shur
Building Department Staff
Fire Prevention Staff
Assessing Department Staff
Cc: Zoning Board File

EQUITABLE WAIVER STATUTORY LANGUAGE

**CHAPTER 674
LOCAL LAND USE PLANNING AND REGULATORY POWERS**

Zoning Board of Adjustment and Building Code Board of Appeals

Section 674:33-a

674:33-a Equitable Waiver of Dimensional Requirement. –

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:

- (a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;
- (b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;
- (c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and
- (d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

II. In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.

III. Application and hearing procedures for equitable waivers under this section shall be governed by RSA 676:5 through 7. Rehearings and appeals shall be governed by RSA 677:2 through 14.

IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

Source. 1996, 226:4, eff. Jan. 1, 1997.